

## **EIGHTY-FIRST SESSION**

### ***In re* LEPRINCE (No. 2)**

#### **Judgment 1556**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs. Georgette Leprince against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 20 November 1995, UNESCO's reply of 10 January 1996, the complainant's rejoinder of 30 January and the Organization's surrejoinder of 22 March 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant's career at UNESCO is summed up under A in Judgment 876 on her first complaint. At the material time she was employed as a secretarial assistant at grade G.6 in the office of the Assistant Director-General in charge of External Relations.

In March 1994 the Director-General announced a decision to transfer the Assistant Director-General for Culture to the Office of External Relations as from 1 June. By a memorandum of 15 June, which the complainant got the next day, the Director of the Bureau of Personnel (PER) told her that as from 20 June 1994 she would be transferred to the Office of the Assistant Director-General for Culture, whose secretary would be moving to her own post.

On 28 June she protested to the Director-General against his decision to transfer her. By a memorandum of 1 August the acting Director of Personnel told her that the Director-General upheld the decision. On 22 August 1994 she appealed to the Appeals Board. In its report of 27 June 1995 the Board held that her transfer had not been decided in the Organization's interests alone and impaired her career prospects. Since she did not want to go back to her old post the Board was not in favour of reversing the decision she had challenged, but it did recommend promoting her to grade P.3 by way of compensation. In a letter dated 28 August 1995, which she is impugning, the Director-General rejected her appeal.

B. The complainant submits that the impugned decision shows two procedural flaws. One is that she did not get the ten days' notice due under Manual item 2445 on transfer to another unit at headquarters. Contrary to what UNESCO made out in the internal proceedings, 2445 is still in effect since the checklist of the UNESCO Manual issued on 25 July 1994 contains a reference to it. So the Organization is bound by the provision under the *patere legem* rule. Besides, it referred to the period of notice in December 1994 when transferring someone else. The other flaw is that the Administration failed to consult the Junior Personal Advisory Board (JPAB) as item 2445 further requires.

The complainant charges the Organization with misuse of authority on the grounds that the only reason for transferring her was the wish of the new Assistant Director-General for External Relations to keep his secretary. She points out that a UNESCO official is allotted duties and is not allotted to a particular person. She denies the Organization's contention that her transfer was intended to give the Assistant Director-General for Culture, a new recruit, the help of "experienced" people like the complainant: the best way to do that would have been to keep on the secretary already there.

She wants the Tribunal to declare the impugned decision unlawful. Since the regrading of her old post was being "seriously considered" she claims 150,000 French francs in material damages for loss of promotion prospects and a further amount, to be determined, for loss of pension rights. She claims 50,000 francs in moral damages and 13,000 in costs.

C.UNESCO replies that it was she who started the dispute by demanding in a memorandum of 28 April 1994 that the then Assistant Director-General for Culture explain in writing how he saw her future.

UNESCO denies her charge of procedural flaws. Manual item 2445 had been obsolete since the issuance of a note on 19 February 1990. Though the authors of the checklist failed to explain that the reference to item 2445 was historical, that is a mere clerical oversight that the complainant may not rely on. Besides, even if 2445 had still been in force she is misconstruing what it says about notice and the JPAB. Paragraph C.2 is not about giving someone notice of transfer but about how soon the official's old unit must release him after transfer to a new one, failing agreement between the two units. According to paragraph 2445.A.3.b, "PER consults, as appropriate, departments, PABs [Personnel Advisory Boards], Joint Disciplinary Committees and the Directorate". The words "as appropriate" mean that only where the rules so require must the case go to a personnel advisory board. In the complainant's case they did not.

The Director-General made proper use of the discretion that the Staff Regulations and precedent allow him. There is "nothing odd in a senior officer's having at least one or two direct subordinates including a secretarial assistant"; indeed efficiency requires it. Nor does anyone have an acquired right to keep a post.

Lastly the Organization denies that upgrading the complainant's old post in the Office of External Relations was not being "seriously considered".

D.In her rejoinder the complainant submits that she never sought a dispute and she never demanded but just wanted to be told in writing what the Assistant Director-General for Culture had in mind for her. The Staff Regulations and Rules confer no privileges as to the assignment of staff on any category like "senior officers". The official who took the impugned decision acted ultra vires; though formally taken by the Director of Personnel on 15 June 1994 it had already been "conceived and put into effect" by the Assistant Director-General for Culture. Besides, the Director told her on 18 May 1994 that she would be kept on her post in External Relations.

Item 2445 does still apply and UNESCO's observing it in another case "estops" it from saying that the item is obsolete. A note it issued, on 19 February 1990, the date of the purported repeal of item 2445, says under item 2405 that "Transfers and promotions are covered by item 2445". She challenges UNESCO's reading of the words "as appropriate" in paragraph A.3.b of 2445: what they mean is that, according to circumstances, the administration shall consult either the departments, the personnel advisory boards, the Joint Disciplinary Committees or the Director-General. In her case it should have consulted a personnel advisory board.

She presses her pleas about misuse of authority and loss of hopes of the promotion that her fine record had led her to expect. "Rushing" her transfer through was offensive to her dignity.

E.In its surrejoinder UNESCO maintains that she picked a quarrel over her transfer, a decision taken solely in the Organization's interests. She was not happy anyway with her post in External Relations, or so it seems from a letter she wrote on 10 January 1989 to the Director-General and from her unwillingness to go back to it. So her complaint shows no cause of action. The impugned decision was taken by the competent official, the Director of the Bureau of Personnel. Item 2445 has been repealed and she misreads it anyway. It was just coincidence that item 2405 was adopted, with its reference to 2445, and 2445 was repealed at the same date. The complainant got due notice of her transfer, which she did not need to prepare for. Since her post was not to be upgraded she has lost no chance of promotion.

#### CONSIDERATIONS:

- 1.The complainant objects to her transfer from the Assistant Director-General of UNESCO for External Relations to the Assistant Director-General for Culture.
- 2.She joined the Organization in 1969, served until 1985 as secretarial assistant at grade G.5 in the Director-General's office, and then for three years with the Assistant Director-General for Social and Human Sciences. From March 1988 she was with the Assistant Director-General for External Relations. She was promoted to G.6 on 1 January 1991.
- 3.By a minute of 10 March 1994 the Director-General decided to reform the Bureau of External Relations and put Mr. Lopes, the then Assistant Director-General for Culture (ADG/CLT), in charge. On 28 April 1994 Mr. Lopes summoned the complainant and told her that he wanted her to switch jobs with his own secretarial assistant. By a

memorandum of even date she asked him for a written explanation of what he had in mind; she also got in touch with the acting Assistant Director-General for External Relations and the Director of the Bureau of Personnel, saying she wanted to keep her post in External Relations.

4. By a memorandum of 15 June 1994 the Director of Personnel gave her notice of transfer as from 20 June to post CLT-139 as secretarial assistant to the Assistant Director-General for Culture. On 28 June she protested, but on 1 August the acting Director of Personnel replied that the Director-General had upheld his decision. She went to the Appeals Board, and on 27 June 1995 it recommended promoting her to P.3 and, if need be, raising to that grade her post as assistant to the Assistant Director-General for Culture. It did not recommend reversing her transfer. In a letter of 28 August 1995 the Director-General rejected the Board's recommendation and her appeal, and that is the decision she is impugning.

5. Like appointment and promotion, transfer is at the discretion of the executive head of the international organisation and subject to only limited review. The Tribunal may interfere only if the decision was taken *ultra vires* or shows formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there was misuse of authority or an obviously wrong inference from the evidence. And the Tribunal will be especially wary in reviewing a transfer since it may not replace the employer's rating of the official with its own.

6. The complainant pleads breach of due process, bad faith and misuse of authority. In her submission the breach of due process was in the failure to give her due notice and to consult the Junior Personnel Advisory Board. As to notice she cites item 2445.C of the Organization's Manual:

"Upon transfer to another organizational unit at headquarters, a staff member is made available to that unit as follows:

1. Professional category: within 20 working days,

2. General Service category: within 10 working days,

of formal approval of the personnel movement."

She says she got notice only on 16 June 1994 of the decision taken the day before to transfer her on 20 June, i.e. four days later. Although UNESCO gave the prescribed notice to someone else in the Culture Sector on transfer in December 1994, it did not apply the rule in 2445 to her.

7. The defendant demurs. It says that according to point 4 of Manual issue note 1310 of 19 February 1990 "item 2445 is obsolete and must be removed in revising Volume II of the Manual". As for the other transfer it made in December 1994, equality in law does not mean equality in the breach of it. Besides, the complainant is misreading 2445.C: it confers no right to notice of transfer.

8. Item 2445 did continue to apply after 19 February 1990. Manual issue note 1424 of 25 July 1994 includes an updated checklist of Manual provisions which is unchanged since the preceding one of 25 May 1993 and which still mentions item 2445. The item came in with Manual issue note 160 of 24 June 1966 and seems to have been the same ever since. The wording of item 2445 changed neither from 24 June 1966 until 25 May 1993, the date of the one checklist, nor from then until 25 July 1994, the date of the next one. Even though the note of 19 February 1990 said that item 2445 was to be dropped from the revised version of Volume II, it was not: indeed it was still there on 25 July 1994. So neither by 15 June 1994, the date of the decision to transfer the complainant, nor indeed, as UNESCO acknowledges by implication, by December 1994, the date of the other official's transfer, had item 2445 been dropped.

9. Yet the item does not help the complainant's case. Item 2445.C does set a time limit, but it is the time limit for the release of an official on transfer from one unit to another, not for the official to take up the new job. The official's former unit may be relieved of the duty to release in the circumstances provided for in the second clause of 2445.C, i.e. where transfer and promotion go together: in that case "the receiving unit may agree to lend the services of the staff member to the releasing unit, on a temporary basis beyond the specified period". The conclusion is that item 2445.C confers no entitlement to notice of transfer.

10. The complainant argues that good faith required due warning of her transfer, and she cites a passage from Judgment 810 (in re Najman No. 5): "... What good faith requires is that when someone is transferred he should be

given proper notice, and not just of a vague intention, but of the nature of the post he is to get and of the duty station".

11. That judgment was about a case of transfer from headquarters to a less senior post elsewhere, and so it was 2445.D that applied: "PER consults the staff member ... [after] which the transfer is approved". It was in those circumstances that the Tribunal held that there must be timely consultation. A transfer, like the complainant's, from one post to another at headquarters comes under 2445.C, which does not require such consultation.

12. In any event she may not plead want of due notice. On 28 April 1994 the Assistant Director-General for Culture told her that he would like her to switch posts with his secretarial assistant, and she herself, in her memorandum of 11 May to the Director of Personnel described the idea as a "sanction ... against me that could in no way be merited". Having been well aware as early as 28 April of the sort of post she was to get and of her duty station, she may not properly plead bad faith.

13. She is again wrong to contend that under 2445.A.3.b UNESCO had to consult the Junior Personnel Advisory Board before transfer. That provision is about transfer to a post at the same or at a lower grade and says: "PER consults, as appropriate, departments, PABs, Joint Disciplinary Committees and the Directorate". She is ignoring item 2400.E.4:

"Transfers not involving any change of grade need not be referred to the PABs for consultation." (Registry's translation).

Since the complainant's transfer meant no change in grade there was no need to bring in the Junior Personnel Advisory Board.

14. She argues that on the defendant's own admission 2400 no longer applied since it came into force at the same time as item 2445, i.e. in June 1966, and was therefore obsolete and irrelevant to her case. But if 2400 had disappeared along with 2445 she might not plead that it was obsolete by the date of the impugned decision since for the reasons given above the Organization would then have acted as if item 2400 still applied at that date. At all events, it appears from the Manual checklist of 25 July 1994 that item 2400 had been dropped by then. So the only surviving rule on personnel advisory boards was Staff Rule 104.1, which does not require consultation on transfer. The conclusion is that there was no need to consult the Junior Personnel Advisory Board on this case.

15. The complainant's last plea is misuse of authority. She says that the reason UNESCO gave for her transfer was the need to give a new recruit the help of someone experienced like herself, and that that reasoning was obviously wrong: as the Appeals Board held, the reason for her transfer was not solely the Organization's interests, and one year later UNESCO moved her yet again. So, in her view, the real reasons for transfer were improper.

16. A firm line of precedent precludes any presumption of misuse of authority: it must be proven on the evidence. Here the main reason that the Assistant Director-General, Mr. Lopes, gave for having the complainant switch jobs was his wish to keep his own secretarial assistant on taking up his new duties. That point of view squares perfectly well with the need to provide him with experienced help. Moreover, the complainant's further transfer one year later is irrelevant to the lawfulness of the one she is objecting to, the more so as she does not even plead, let alone prove, that the later one was unwarranted or fatally flawed. Under the circumstances, there are no grounds for supposing that UNESCO trumped up the reasons for the transfer.

17. The switch of jobs would have been unlawful only if the complainant had not been put on a post requiring the same level of skills and qualifications as the old one or had suffered material or moral injury. On that score she raises no objections. Since she fails to show that UNESCO's reasons for her transfer were wrong or that the transfer was improper, her plea of misuse of authority cannot succeed.

18. Since her main claims fail so do her claims to damages and to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas  
E. Razafindralambo  
Egli  
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.